SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1967

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JOHN F. TINKER and MARY BETH TINKER, Minors, by Their Father and Next Friend, LEONARD TINKER, and CHRISTOPHER ECKHARDT, Minor, by His Father and Next Friend, WILLIAM ECKHARDT,
Petitioners,

vs.

THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, THE BOARD OF DIRECTORS OF THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, ORA E. NIFFENEGGER, MRS. MARY GREFE, ARTHUR DAVIS, L. ROBERT KECK, GEORGE CAUDILL, JOHN R. HAYDON, MERLE F. SCHLAMPP, DWIGHT DAVIS, ELMER BETZ, GERALD JACKSON, MELVIN BOWEN, DONALD WETTER, CHESTER PRATT, CHARLES ROWLEY, RAYMOND PETERSON, RICHARD MOBERLY, VERA TARMANN, LEO WILLADSEN, DONALD BLACKMAN, VELMA CROSS, and ELLSWORTH E. LORY,
Respondents.

ON WRIT OF CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

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SUPREME COURT OF THE UNITED STATES

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No. 1034

JOHN F. TINKER and MARY BETH TINKER, Minors, by Their Father and Next Friend, LEONARD TINKER, and CHRISTOPHER ECKHARDT, Minor, by His Father and Next Friend, WILLIAM ECKHARDT,
Petitioners,

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THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, THE BOARD OF DIRECTORS OF THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, ORA E. NIFFENEGGER, MRS. MARY GREFE, ARTHUR DAVIS, L. ROBERT KECK, GEORGE CAUDILL, JOHN R. HAYDON, MERLE F. SCHLAMPP, DWIGHT DAVIS, ELMER BETZ, GERALD JACKSON, MELVIN BOWEN, DONALD WETTER, CHESTER PRATT, CHARLES ROWLEY, RAYMOND PETERSON, RICHARD MOBERLY, VERA TARMANN, LEO WILLADSEN, DONALD BLACKMAN, VELMA CROSS, and ELLSWORTH E. LORY,
Respondents.

ON WRIT OF CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (A. 77) is reported at 383 F. 2d 988. The opinion of the United States

District Court for the Southern District of Iowa, Central Division (A. 71) is reported at 258 F. Supp. 971.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit, en banc, was entered on November 3, 1967. It affirmed by an equally divided court the judgment of the United States District Court for the Southern District of Iowa, Central Division, which dismissed a complaint brought by petitioners under Section 1983 of Title 42 of the United States Code. Petition for a writ was granted on March 4, 1968. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question to be determined is whether the action of officials of defendant school district forbidding the wearing of arm bands on school facilities as a means of protesting the Viet Nam War deprived petitioners of Constitutional rights secured by the First and Fourteenth Amendments of the United States Constitution.

STATEMENT

In November, 1965, petitioner Christopher Eckhardt and his mother participated with a group of college students and Dr. Spock and others, including Students for Democratic Society in a march and demonstration in Washington, D. C. for an end of the Viet Nam War. (A. 30). The purpose of the trip to Washington in November of 1965, was an end the Viet Nam War march. It was a march from the White House to the Washington Monu-

ment. Christopher Eckhardt and his mother and others carried banners and placards protesting the war in Viet Nam. (A. 35).

On Saturday, December 11, 1965, following this march, a group including college students related to the Students for Democratic Society and some adults met at the Eckhardt home. (A. 52, 53, 54). One of the proposals suggested at this meeting was the wearing of black arm bands. (A. 53). (None of the petitioners attended this meeting.) It was made up of college students and adults.

About Saturday night, December 11, 1965, the parents of the petitioner Christopher Eckhardt told him some college students and interested people were going to be wearing black arm bands December 16 until January 1. His parents learned of this at a meeting at the Eckhardt home, but the petitioner Christopher Eckhardt did not attend that meeting. (A. 30).

On Thursday, December 16, Christopher Eckhardt first wore the black arm band to Roosevelt High School. He arrived at about 8:00 A.M. and went directly to the principal's office. A student asked him if he knew there was a rule against wearing the black arm band, and Christopher Eckhardt said he knew there was a rule against it. The Wednesday morning paper contained an article saying the principals had met together and had decided it would cause a disturbing influence in the schools and they had prohibited it. Christopher Eckhardt thought he might be suspended, and that is why he went directly to the principal's office. Mr. Blackman, the vice principal, asked him to take the arm band off and Christopher Eckhardt told him he was not going to, and the vice principal said he would have to suspend him because the principals had decided it was against the rules to wear black arm bands. (A. 30, 31).

The vice principal called Christopher Eckhardt's mother. (A. 31). At that time Christopher Eckhardt's mother held some office in the Women's International League for Peace and Freedom. Mrs. Eckhardt and Christopher had carried placards protesting the war in Viet Nam in the march from the White House to the Washington Monument. Christopher Eckhardt wore the black arm band to school as a matter of protest of the war in Viet Nam and a hope for a Christmas truce. He hoped in some small way to influence public opinion toward his views of the war in Viet Nam. (A. 35, 36).

Christopher Eckhardt had walked from Ames to Des Moines two and one-half years before in a Civil Rights demonstration, and also was at a demonstration at the Hotel Fort Des Moines. His parents have participated in some of the other marches. (A. 36).

When Mr. Blackman, the vice principal, called Mrs. Eckhardt, she said Christopher had a constitutional right to wear the arm band if he so desired. (A. 44).

Rev. Leonard Tinker is a Methodist minister without a church, under appointment by the Methodist appointive powers to serve as "Secretary for Peace and Education". He is paid a salary by the American Friends Service Committee but has no connection with the Friends Church. He is familiar with the Students for Democratic Society. There were Students for Democratic Society and some adults at the Eckhardt home on Saturday, December 11, 1965, people who had been to Washington for the march assembled at the Eckhardts. Rev. Tinker came into the meeting at the close of the session to get his wife and was generally aware of what took place. One of the proposals was wearing black arm bands to support the truce supported by Senator Kennedy to mourn the deaths in Viet Nam. (A. 52, 53).

A second meeting was held at the Eckhardt home on Sunday, December 12, of high school, liberal, religious youths. (A. 54).

Rev. Tinker knew his children went to school with black arm bands. They knew about the proposal for college students to wear black arm bands. He testified he became convinced this was definitely a matter of conscience for the children and he considered it an exercise of their own constitutional right. (A. 55, 56).

Four of the Tinker children wore black arm bands. Petitioner John F. Tinker, age 15, attended North High. Petitioner Mary Beth Tinker, age 13, attended Warren Harding Junior High. Paul and Hope Tinker, age 8 and 11, respectively, the younger brother and sister of petitioners John and Mary Beth Tinker, also wore black arm bands to their respective schools. (Footnote A. 72).

Petitioner John F. Tinker testified that during the month of December, 1965, he decided to participate with several other people "in a witness or demonstration of views" by wearing black arm bands over the holiday season. (A. 15).

John has been in several demonstrations against the war and several Civil Rights demonstrations. The subject of the war in Viet Nam and the political and moral implications are discussed quite often in his home. (A. 16). John had not attended any meetings concerning wearing of arm bands prior to Wednesday, December 15. Most of the others wore arm bands on Thursday, December 16, but John first wore his arm band on Friday, December 17. (A. 16). After gym class some of the students were making fun of John for wearing the arm band. Others who were friends said they did not want him to get into trouble. Two or three boys made remarks in the locker room that

were not very friendly. He had lunch in the student center with several other students with whom he eats frequently. They warned him in a friendly manner to take the arm band off. There was one student with whom he had a feud in the 7th grade who was making smart remarks for about 10 minutes. There were 4 or 5 people with him standing and milling around. There were no threats to hit him. He was not in fear they might attack him because there were too many there. A football player named Joe Thompson told the kids to leave him alone. (A. 18). When he went to English class he still had the arm band on and Mr. Lory told him they were waiting for him in the office. He went down to the principal's office and the principal said he would have to ask him to take the arm band off, that he knew he couldn't wear it in school. He said something about following orders from higher up. When John told him he was not going to take the arm band off, Mr. Wetter told him he would have to leave school but would not be suspended, and that as soon as he took the arm band off or there was a different ruling on it that he could come back to school. (A. 19). John's father arrived at school and talked to Mr. Wetter. John never received a notice of official suspension. (A. 19).

John's sister, petitioner Mary Beth Tinker, wore a black arm band and got sent home from school. A younger sister, Hope, who is 11 and in the 5th grade, wore an arm band on Thursday morning, and Paul, who is 8, wore a black arm band to school on Thursday morning. John testified that his mother and father participated in most of the demonstrations against the war in Viet Nam and civil rights demonstrations that John has participated in. (A. 20, 21).

When John wore the arm band to school, his friends made complimentary remarks and those who were not his

friends, made uncomplimentary remarks. He supposed he was attracting some attention by wearing the arm band. He wanted students and everybody else that saw it to know he was wearing it, and he welcomed questions at school while he was wearing it. John and his parents are generally against the policy of the government in Viet Nam. By wearing the arm band he supposed he would have influenced public opinion about the matter of Viet Nam and to call attention to it; to influence people to believe as he did. On that day he ate lunch, the students made uncomplimentary remarks to him. Some referred to him as a "commie" and other things of that nature. Then one boy quieted everything down and told everybody to lay off John. (A. 22, 23).

Petitioner Mary Beth Tinker testified that she is 13 years old and decided to participate in the "witness or demonstration" by wearing a black arm band beginning Thursday, December 16 until New Years, fasting one day and Christmas Eve, and attending New Year's services at the Unitarian Church. She testified the purpose was to mourn the dead in Viet Nam and to urge a Christmas truce which hopefully would be open ended; to last and keep going on until there would be a settlement to end the war. This was not the first time she engaged in a witness or demonstration of her ideas about peace and war. There have been demonstrations off and on protesting the Viet Nam War and also about Civil Rights that she has been in. (A. 24, 25).

The students noticed the black arm band and asked about it and told her she had better take it off or she would get into a lot of trouble. This was in sewing class. In English class the students told her she had better take the arm band off. She wore the arm band to lunch in the cafeteria and a couple of girls sitting at her table told her

sible and asked if they would like to ask their child to remove the black arm band. If there was still refusal, the student would be sent home until such time as the black arm band should be removed or that the Board of Education should reverse the decision. (A. 45). The policy was directed not at the students but at the principle of demonstration in schools. Dr. Peterson testified:

"Q. I don't understand that. A. We had no particular students in mind whatsoever. No individual students. It was those who might go against the regulation. That could have been any of the 18,000 students. Q. But it was the principle involved? A. That's what I said, yes, the principle of the situation. Q. Over the Viet Nam War? A. No, it was the principle of the demonstration. . . ."

"'For the good of the school system we don't think this should be permitted. The schools are no place for demonstrations. We allow for free discussion of these things in the classes. The policy was based on a general school policy against anything that was a disturbing situation within the school. The school officials believe that the educational program would be disturbed by students wearing arm bands.' are correct statements of the policy as I remember it." (A. 46).

"It's understood among the principals that anything which interrupts the general educational procedure of the school may be excluded by the principal in the building itself." (A. 47).

Respondents' or defendants' Exhibit 4 sets out the history of events leading up to the banning of the arm bands. The national news media indicated the arm band's original intent was in protest to U. S. government policy in Viet Nam. Later it was changed to mourning

all the dead. A student at Roosevelt High School wanted to publish an article relating to Viet Nam. Not being able to find the principal, Dr. Rowley, he talked to Dr. Mitchum who called the superintendent and decided to call a meeting of the senior high principals for December 14 to ask them their suggestions for handling the wearing of black arm bands which was understood to take place December 16. All five senior high principals were in agreement to follow the procedure later outlined in the Board minutes of the meeting of December 21, 1965. Following the announcement to the students that arm bands would not be permitted, one of the students then contacted the newspaper. The reporter then contacted the school administrators for information. The secondary principals were called to meet on Thursday, December 23, to see if they thought it would be wise to alter the previous decision. All present felt a wise decision had been made in spite of public concern over one small aspect of the school program. The following reasons were given:

1. A former student of one of our high schools was killed in Viet Nam. Some of his friends are still in school and it was felt that if any kind of a demonstration existed, it might evolve into something which would be difficult to control.

2. The schools hold appropriate assemblies on Veteran's Day to honor the dead. Also, Memorial Day is recognized.

3. The principals were following standard procedure for what is considered inappropriate dress, haircuts or other actions that attract attention.

4. Students at one of the high schools were heard to say they would wear arm bands of other colors if the black bands prevailed.

5. Principals felt that since the schools are made up of a captive audience, the other students should not be forced to view the demonstrations of a few.

6. One principal reported a Nazi arm band on a boy who came to school several weeks ago. When asked to remove it, he complied.

7. These students were sent home from school until such time as the students were willing to return without the arm band. No student was suspended for a specified length of time. (A. 68, 69, 70).

Ora Niffenegger, school board president, first had the matter of black arm bands called to his attention on December 16, 1965, which was Thursday. The regular board meeting was the following Tuesday. At the meeting the board decided to get legal advice and make further investigation. The board met again the first Monday evening in January and voted to uphold the administrative policy. That policy was the prohibition against the wearing of arm bands in school. The proponents of the arm bands appeared at the regular meeting in January, represented by Professor Craig Sawyer of the Drake Law School, and anyone could speak at the regular board meeting. If they would give their names ahead of time, it would be printed in the agenda if there was time for it. The board room was filled to overflowing. There were a few signs present. On several occasions it was a bit touch and go as far as maintaining order. In other words, there was some demonstration from people locally and apparently from outside the city. (A. 47, 48, 49).

On December 19, 1965, Sunday night before the Tuesday meeting of the board December 21, a meeting was called at the offices of Leonard Tinker at Friends House, 4211 Grand Avenue, at which 50 people were present, rela-

tive to the arm bands. Craig Sawyer was at this meeting. He represented the Civil Liberties Union. Reverend Tinker called the meeting on December 19, 1965. He was asked to refresh his recollection as to the origin of wearing the arm bands, referring to the newspaper of December 22, 1965, which says that Mrs. Eckhardt is President of the Women's International League for Peace and Freedom which joined with S.D.S. (Students for Democratic Society) in recommending that the arm bands be worn. Reverend Tinker read the article in the paper, but the implication of the paper as he understood it is not that the group met in any official way to instigate the wearing of the arm bands. Reverend Tinker had previously spoken against the United States policy in Viet Nam at a meeting at the post office in October. He declined to answer the question as to whether he agreed with Professor Sawyer's statement made at the school board meeting that he would support the freedom to wear a Nazi arm band or arm bands saying "down with the school board". (A. 59, 60, 61).

John Tinker testified that he attended the meeting of some fifty people at the building where his father's office is and there were some accounts by some of the students there as to physical violence that had been inflicted upon them over the wearing of the arm bands. Either Bruce Clark or Ross (Peterson) said somebody had struck him. It could have been both of them. He stated he was there and recalled hearing somebody say that. (A. 62).

The appendix which petitioners have furnished as setting out the record is defective. Page 29 follows page 24. Pages 25, 26, 27 and 28 precede page 23.

Page 74 is a repetition of page 73, and the appendix wholly omits a portion of the Court's memorandum opinion which follows what is shown on pages 73 and 74. In order to complete the record, respondents are setting out

herein the portion of the record which properly follows page 73 which is omitted from the appendix prepared by the petitioners, and have continued to the end of the record so this Court may have the matter in context. It reads as follows:

> "A subject should never be excluded from the classroom merely because it is controversial. It is not unreasonable, however, to regulate the introduction and discussion of such subjects in the classroom. The avowed purpose of the plaintiffs in this instance was to express their views on a controversial subject by wearing black arm bands in the schools. While the arm bands themselves may not be disruptive, the reactions and comments from other students as a result of the arm bands would be likely to disturb the disciplined atmosphere required for any classroom. It was not unreasonable in this instance for school officials to anticipate that the wearing of arm bands would create some type of classroom disturbance. The school officials involved had a reasonable basis for adopting the arm band regulation.
>
> "On the other hand, the plaintiffs' freedom of speech is infringed upon only to a limited extent. They are still free to wear arm bands off school premises. In addition, the plaintiffs are free to express their views on the Viet Nam war during any orderly discussion of that subject. It is vitally important that the interest of students such as the plaintiffs in current affairs be encouraged whenever possible. In this instance, however, it is the disciplined atmosphere of the classroom, not the plaintiffs' right to wear arm bands on school premises, which is entitled to the protection of the law.
>
> "Plaintiffs cite two recent opinions from the Court of Appeals for the Fifth Circuit in support of their position. Burnside v. Byars, Civil No. 22681, 5th Cir., July 21, 1966; Blackwell v. Byars, Civil No. 22712, 5th Cir., July 21, 1966. These cases involved the wearing of

'freedom buttons' in Mississippi schools. In holding in one of the cases that the school regulation prohibiting the wearing of such buttons was not reasonable, the Court stated that school officials 'cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.' Burnside v. Byars, supra, at 9. While the decisions of the Court of Appeals for the Fifth Circuit are entitled to respect and should not be brushed aside lightly, they are not binding upon this Court. John Deere Co. v. Graham, 333 F. 2d 529 (8th Cir. 1964). After due consideration, it is the view of the Court that actions of school officials in this realm should not be limited to those instances where there is a material or substantial interference with school discipline. School officials must be given a wide discretion and if, under the circumstances, a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the Court. In the case now before the Court, the regulation of the defendant school district was, under the circumstances, reasonable and did not deprive the plaintiffs of their constitutional right to freedom of speech.

"The plaintiffs' request for an injunction and nominal damages are denied. Judgment will be entered accordingly.

"Dated this 1st day of September, 1966."

ARGUMENT

I.

The Regulation of Respondent School District Was, under the Existing Circumstances, Reasonable and Did Not Deprive Petitioners of Their Constitutional Right of Freedom of Speech under the United States Constitution.

As stated by the trial court in this case:

> "Officials of the defendant school district have the responsibility for maintaining a scholarly, disciplined atmosphere within the classroom. These officials not only have a right, they have an obligation to prevent anything which might be disruptive of such an atmosphere. Unless the actions of school officials in this connection are unreasonable, the Courts should not interfere. . . .
>
> "School officials must be given a wide discretion and if, under the circumstances, a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the Court. In the case now before the Court, the regulation of the defendant school district was, under the circumstances, reasonable and did not deprive the plaintiffs of their constitutional right to freedom of speech."

In the case of *Blackwell* v. *Issaquena County Board of Education*, 5th Cir. (1966) 363 F. 2d 749, the Circuit Court sustained a school regulation forbidding the wearing of "freedom buttons" as a reasonable rule necessary for the maintenance of school discipline.

> "Cases of this nature, which involve regulations limiting freedom of expression and the communication of an idea which are protected by the First Amendment,

present serious constitutional questions. A valuable constitutional right is involved *and decisions must be made on a case by case basis*, keeping in mind always the fundamental constitutional rights of those being affected. Courts are required to weigh the circumstances and appraise the substantiality of the reasons advanced which are asserted to give rise to the regulations in the first instance. Thornhill v. State of Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L.Ed. 1093 (1940). The constitutional guarantee of freedom of speech 'does not confer an absolute right to speak' and the law recognizes that there can be an abuse of such freedom."

In the instant case, petitioner Christopher Eckhardt and his mother in November of 1965 had gone to Washington, D. C. to participate by carrying banners in the march from the White House to the Washington Monument to protest the Viet Nam War. (A. 35). Mrs. Eckhardt was President of the Des Moines Chapter of the Women's International League for Peace and Freedom. (A. 61). The organization known as Students for Democratic Society had been active in that march and some college students related to Students for Democratic Society and some adults held a meeting at the Eckhardt home Saturday afternoon, December 11, 1965. People who had been to Washington assembled at the Eckhardt home, and one of the proposals that came out of that meeting was to wear black arm bands to support the truce proposed by Senator Kennedy and to mourn the dead in Viet Nam. (A. 52, 53). The arm bands were to be worn from December 16 to January 1. (A. 30).

(None of the petitioners attended this meeting at the Eckhardt home on Saturday afternoon, December 11, 1965.)

The following evening, Sunday, December 12, a second meeting was held at the Eckhardt home of "high school religious youths". (A. 54).

The wearing of the arm bands was a program planned for Students for Democratic Society joined in by the Women's International League for Peace and Freedom. (A. 61).

Reverend Leonard Tinker is a Methodist minister without a church, assigned to serve as "Secretary for Peace and Education". He is paid a salary by the American Friend's Service Committee but has no connection with the Friend's Church. He is familiar with Students for Democratic Society. There were Students for Democratic Society and some adults at the Eckhardt home on Saturday afternoon, December 11, 1965, people who had been to Washington for the march assembled at the Eckhardts.

Reverend Tinker knew his children went to school wearing the black arm bands. He testified he became convinced this was a matter of conscience for the children and considered it an exercise of their constitutional right. (A. 55, 56).

Four Tinker children went to school wearing black arm bands. Petitioner John Tinker, age 15, attended North High, petitioner Mary Beth Tinker, age 13, attended Warren Harding Junior High, Paul, age 8, and Hope, age 11, wore arm bands at their respective schools (Footnote A. 72). Respondents submit that it clearly appears the proposal to wear black arm bands was a propaganda program instituted by Students for Democratic Society and certain adult demonstrators at the meeting at the Eckhardt home, at which meeting none of the petitioners was even in attendance.

When Reverend Tinker has four children, ages 15, 13, 11 and 8 going to their respective schools each with a black arm band, is it more reasonable to conclude they

were doing this as a matter of conscience in the exercise of their constitutional rights, or is Reverend Tinker, the Secretary for Peace and Education, through his children, undertaking to infiltrate the school with his propaganda?

Petitioner John Tinker, age 15, has been in several demonstrations against the war and civil rights demonstrations. (A. 16). His mother and father have participated in most of these demonstrations. (A. 20, 21).

So far as the City of Des Moines is concerned, the meeting where the proposal to wear the black arm bands originated was held on the afternoon of December 11 at the Eckhardt home. Petitioner Christopher Eckhardt did not even attend that meeting. (A. 30). He was out shoveling snow. (A. 35). His mother, who was President of the Des Moines Chapter of the Women's International League for Peace and Freedom, had taken Christopher Eckhardt to Washington, D. C. where they had both participated in a march to protest the Viet Nam War.

Petitioner Christopher Eckhardt and his parents have participated in other marches. (A. 36).

When the vice principal at Roosevelt High School called Mrs. Eckhardt about Christopher wearing the black arm band and refusing to remove it, it was Mrs. Eckhardt who said Christopher had the constitutional right to wear the black arm band if he so desired. (A. 44).

The trial court in this case stated:

> "The Viet Nam War and the involvement of the United States therein has been a subject of major controversy for some time. When the arm band regulation involved herein was promulgated, debate over the Viet Nam War had become vehement in many localities. A protest march against the war had been recently held in Washington, D. C. A wave of draft

card burning incidents protesting the war had swept the country. At that time two highly publicized draft card burning cases were pending in this Court. Both individuals supporting the war and those opposing it were quite vocal in expressing their views. This was demonstrated during the school board's hearing on the arm band regulation. At this hearing, the school board voted in support of the rule prohibiting the wearing of arm bands on school premises. It is against this background that the Court must review the reasonableness of the regulation."

E. Raymond Peterson, Director of Secondary Education in the Des Moines Schools, testified that the Superintendent of Schools directed him to call a meeting of the principals on Tuesday morning, December 14, 1965. At that meeting, the policy prohibiting the wearing of arm bands was made.

The student was first to be asked to remove the black arm band. If he refused, he was to be sent to the particular building in which he was housed and be asked by the administrative personnel to remove the black arm band. If he still refused, his parents would be contacted if possible and asked if they would like to ask their child to remove the black arm band. If there was still a refusal, the student would be sent home until such time as the black arm band should be removed or the Board of Education should reverse the decision. (A. 45).

Dr. Peterson testified:

"The regulation was not directed at any of the 18,000 students individually, but at the principle of demonstration. . . ."

" 'The schools are no place for demonstrations. We allow for free discussion of these things in the classes. The policy was based on a general school policy against anything that was a disturbing situation within the

school. The school officials believe that the educational program would be disturbed by students wearing arm bands.' are correct statements of the policy as I remember it." (A. 46).

Defendants' Exhibit 3 is a policy promulgated and adopted by the school board at about the time the arm band situation arose. Defendants' Exhibit 4 is a report that Dr. Peterson made to Dr. Davis. It was understood among the principals that anything which interrupts the general educational procedure of the school may be excluded by the principal in the building itself. (A. 47).

Exhibit 3 is set out in full at (A. 67, 68). Exhibit 4 is set out in full at (A. 68, 69, 70).

The reasons set out in Exhibit 4 forbidding wearing arm bands were that a high school student had been killed in Viet Nam and it was felt that any kind of a demonstration might evolve in something difficult to control. The schools hold appropriate assemblies on Veterans' Day and Memorial Day. The principals were following standard procedure for what is considered inappropriate dress, haircuts or other actions that attract attention. Students at one of the high schools were reported to say they would wear arm bands of other colors if the black bands prevailed. The principals felt that since the schools are made up of a captive audience, the other students should not be forced to view the demonstrations of a few. (5 out of 18,000 students wore black arm bands.) Students were sent home until such time as they were willing to return without the arm bands. No student was suspended for a specified length of time. (A. 70).

Ora Niffenegger, President of the school board, testified that the matter of the arm bands first came to his attention on Thursday, December 16, 1965. The following Tuesday was the first board meeting. At that time a de-

cision was delayed to seek legal advice, and in the January meeting by a majority vote, the board upheld the administration in forbidding the wearing of arm bands. (A. 47, 48).

These people (demonstrators) appeared at the regular meeting in January represented by Professor Craig Sawyer of the Drake Law School. Anyone could speak at the regular board meetings. If they gave their names ahead of time, it would be printed in the agenda if there was time for it. The board room was filled to overflowing. There were a few signs present and on several occasions it was a little bit touch-and-go as far as maintaining order. In other words, there was some demonstration from people locally and apparently from outside the city. (A. 49).

A meeting was held Sunday night, December 19, of some 50 persons to discuss fighting the suspension of students for wearing arm bands. This was just ahead of the Tuesday meeting on the 21st where the group appeared before the school board represented by Craig Sawyer who represented the Civil Liberties Union. Reverend Tinker called the meeting on December 19, 1965. (A. 59, 60).

Petitioner John Tinker had not attended any meeting concerning wearing arm bands prior to Wednesday night, December 15. (A. 60). At the meeting in his father's office (December 19, 1965) John attended and there were accounts of physical violence over wearing arm bands. Either Bruce Clark or Ross (Peterson) said somebody had struck him. (A. 62).

In view of this record, it cannot be said that no disturbance resulted from the wearing of the arm bands. Except for the prompt action by the school administration, the problem might well have developed into the type of demonstration that has been witnessed throughout the country in the past two or three years.

Christopher Eckhardt went directly to the principal's office in defiance of and to challenge the rule. The fact that the principal acted immediately and decisively avoided the demonstration at Roosevelt High School. (A. 30, 31).

The school administration adopted the clear and definite rule or regulation, and all but 5 of the 18,000 students involved obeyed it without question.

In *Adderley* v. *State of Florida*, 385 U.S. 39, 87 S. Ct. 242, students from Florida A. & M. University went from school to the jail to demonstrate their protests of arrests of other students protesting the day before. That petition relied upon some of the cases relied upon by the petitioners here. They claimed they had a right to demonstrate on the court house and jail house grounds, stating that the area chosen for peaceful civil rights demonstrations was not only reasonable but also particularly appropriate. The United States Supreme Court in answering this argument, stated at page 247 of 87 S. Ct.:

> "Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, Cox v. State of Louisiana, 85 S. Ct., at 464 and 480. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose."

II.

Disturbances in Schools Are Not Properly Measured by Identical Standards Used to Measure Disturbances on the Streets, in Eating Houses or Bus Depots.

In *Brown* v. *Louisiana*, 383 U.S. 131, 86 S. Ct. 719 (1966), this Court by a five to four decision determined

that for five adult Negroes to remain in a library room for five to ten minutes during which they requested a particular book, did not justify their arrest and conviction for breach of the peace. The opinion of Mr. Justice Fortas and the concurring opinions of Mr. Justice Black and Mr. Justice White, each emphasized the brief interval of time of ten to fifteen minutes as a principal if not a conclusive fact in the case.

To support his opinion, Mr. Justice Fortas cited three prior Louisiana cases. *Garner* v. *State of Louisiana,* 658 U.S. 157, 82 S. Ct. 248, 7 L.Ed. 2d 207, which involved sit-ins by Negroes at lunch counters catering only to white. *Taylor* v. *State of Louisiana,* 370 U.S. 154, 82 S. Ct. 1188, 8 L.Ed. 2d 395, concerned a sit-in by Negroes in a waiting room in a bus depot reserved for whites only, and *Cox* v. *State of Louisiana,* 379 U.S. 536, 85 S. Ct. 453, 13 L.Ed. 2d 471, which involved the leader of 2,000 Negroes who demonstrated in the vicinity of the Court House and Jail to protest the arrest of fellow demonstrators.

The *Brown* case emphasizes the importance of considering and analyzing the facts as controlling in each particular case.

In the *Brown* case, Mr. Justice Black wrote a dissenting opinion, joined in by Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Stewart. At page 732 of 86 S. Ct., Mr. Justice Black stated:

> "Contrary to the implications in the prevailing opinion it is incomprehensible to me that a State must measure disturbances in its libraries and on the streets with identical standards. Furthermore, the vice of discriminatory enforcement, which contaminates the public street phase of this statute does not beset the statute's application to activity in public buildings. *In the public building, unlike the street, peace and quiet is a fast and necessary rule, and as a result*

there is much less room for peace officers to abuse their authority in enforcing the public building part of the statute."

At page 735 of 36 S. Ct., Mr. Justice Black stated:

"Moreover, the conclusion that the statute was unconstitutionally applied because it interfered with the petitioners' so-called protest establishes a completely new constitutional doctrine. In this case this new constitutional principle means that even though these petitioners did not want to use the Louisiana public library for library purposes, they had a constitutional right nevertheless to stay there over the protest of the librarians who had lawful authority to keep the library orderly for the use of people who wanted to use its books, its magazines, and its papers. But the principle espoused also has a far broader meaning. It means that the Constitution (the First and the Fourteenth Amendments) requires the custodians and supervisors of the public libraries in this country to stand helplessly by while protesting groups advocating one cause or another, stage 'sit-ins' or 'stand-ups' to dramatize their particular views on particular issues. And it should be remembered that if one group can take over libraries for one cause, other groups will assert the right to do so for causes which, while wholly legal, may not be so appealing to this Court. The States are thus paralyzed with reference to control of their libraries for library purposes, *and I suppose that inevitably the next step will be to paralyze the schools.* Efforts to this effect have already been made all over the country. . . .

"The First Amendment, I think, protects speech, writings, and expression of views in any manner in which they can be legitimately and validly communicated. But I have never believed that it gives any person or group of persons the constitutional right to go wherever they want, whenever they please, without regard to the rights of private or public property or to state law. Indeed a majority of this Court said

> as much in Cox v. State of Louisiana, 379 U.S. 559, 574, 85 S. Ct. 476, 485, 13 L. Ed. 2d 487. Though the First Amendment guarantees the right of assembly and the right of petition along with the rights of speech, press, and religion, it does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas."

So, in the instant case, whatever rights the Students for Democratic Society or whatever rights Reverend Tinker has as Secretary for Peace and Education, and whatever rights Mrs. Eckhardt has as President of the local chapter of the International League for Peace and Freedom to demonstrate their views, they should not be permitted to infiltrate the schools with such demonstrations and disrupt the scholarly discipline that is necessary to a school room.

III.

The Rule Forbidding the Wearing of Black Arm Bands in the Schools Should Be Upheld Because the Rule Was Reasonably Calculated to Promote Discipline in the Schools.

In the case of *Blackwell* v. *Issaquena County Board of Education*, 5th Cir. (1966), 363 F. 2d 749, the Circuit Court of Appeals sustained a regulation forbidding the wearing of freedom buttons in the schools. At page 754 of 363 F. 2d the Court said:

> "The Constitution does not confer unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom. Whitney v. People of State of California, 274 U.S. 357, 47 S. Ct. 641, 71 L.Ed. 1095 (1927). The interests which the regulation seeks to protect must be fundamental and substantial if there is to be a restriction of speech. In Dennis v. United States, 341 U.S. 494, 71 S. Ct. 857, 95 L.Ed. 1137 (1951), the Supreme Court approved the following statement of the rule by Chief Judge Learned Hand:

"'In each case (courts) must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'

". . . The school authorities in the instant case had a legitimate and substantial interest in the orderly conduct of the school and a duty to protect such substantial interests in the school's operation."

The Court then distinguishes the case of *Burnside* v. *Byars*, 363 F. 2d 744, decided by the same Court at the same time, as being distinguishable on the facts. At page 754 of 363 F. 2d the Court said:

"As we said in Burnside, 'It is not for us to consider whether such rules are wise or expedient but merely whether they are a reasonable exercise of the power and discretion of the school authorities.'"

Petitioners here relied heavily on *Burnside* v. *Byars*, supra, in their petition for the writ of certiorari to this Court, stating that that case conflicted with the decision of the trial court in the instant case. In *Burnside* v. *Byars* the Court granted a temporary injunction, but stated at page 749 of 363 F. 2d it was granted "without prejudice to the making of a further order and judgment if additional, different or more complete facts are developed upon final hearing which would authorize the entry of such additional judgment."

In view of the decision in *Blackwell* v. *Issaquena County Board of Education*, and the fact that in the Byars case only a temporary injunction was granted, cannot be urged as a strong precedent for the petitioners here.

What the Court undertook to do in *Burnside* v. *Byars* and in *Blackwell* v. *Issaquena County Board of Education* was to decide each case on its own facts, and measured by

that rule, the Court here should sustain respondents' position.

The Court is not to substitute its judgment for the judgment of the directors of the school district, but only to determine whether there has been such an abuse of discretion by the school district as to justify interference by the Court.

In *Pugsley* v. *Sellmeyer*, 158 Ark. 247, 257 S.W. 538, the plaintiff was suspended from school for violating a school rule forbidding the use of face paint or cosmetics. She brought mandamus to require her admission to school notwithstanding her refusal to obey the rule. The Supreme Court of Arkansas affirmed the lower court's decision denying the writ, and the court stated:

> "The courts will not interfere with the exercise of discretion by school directors in matters confided by law to their judgment, unless there is a clear abuse of the discretion or a violation of the law. . . . The question, therefore, is not whether we approve this rule as one we would have made as directors of the district, nor are we required to know whether it was essential to the maintenance of discipline. On the contrary, we must uphold the rule unless we find that the directors have clearly abused their discretion and the rule is not one reasonably calculated to effect the purpose intended of promoting discipline in the schools."

In *Cox* v. *New Hampshire*, 312 U.S. 569, 61 S. Ct. 762 (1941), the United States Supreme Court upheld a New Hampshire conviction of Jehovah's Witnesses convicted for violating a state statute prohibiting a parade without a special license. The Jehovah's Witnesses contended that the statute was an invalid infringement upon their First and Fourteenth Amendment rights of free speech, press,

religion, and assembly. Upholding their conviction, the Supreme Court said:

> "Civil liberties as guaranteed by the Constitution imply the existence of an organized society, maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

In *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 81a S. Ct. 997 (1961), Konigsberg refused to answer questions asked by the Bar Committee of the State of California relative to his qualifications. The Bar Committee refused to certify him on the grounds that his refusal to answer had obstructed a full investigation into his qualifications. The Supreme Court held that it was a valid governmental purpose to require proof of good moral character and that the Bar Association could require him to respond to the questions put to him without violation of the First and Fourteenth Amendments to the United States Constitution. Beginning on page 50 of 366 U.S. and page 1006 of 81a, S. Ct. Rep., Justice Harlan speaking for the Court said:

> "At the outset we reject the view that freedom of speech and association (N.A.A.C.P. v. State of Alabama ex rel. Patterson, 357 U.S. 449, 460, 78 S. Ct. 1163, 1170, 2 L.Ed. 1488) as protected by the First and Fourteenth Amendments, are 'absolutes' not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection (Citing cases . . .). On the other hand, general

> regulatory statutes, not intended to control the content of speech, but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved."

The instant case does not conflict with prior applicable decisions of the United States Supreme Court. The law in Iowa and elsewhere gives school authorities the right to adopt reasonable rules and regulations governing the conduct of the pupils. If the regulation is reasonable in the light of existing facts and circumstances the Court may not question the discretion vested in the school authorities. It is not for the courts to consider whether the rule in retrospect was wise or expedient so long as it was a reasonable exercise of the discretion vested in the school authorities. The *Board of Directors of the Independent School District of Waterloo, Iowa* v. *Ronald Green*, 147 N.W. 2d 854, Iowa, 1967; *Kinzer* v. *Independent School District*, 129 Iowa 441, 105 N.W. 686; *Pugsley* v. *Sellmeyer et al.*, 158 Ark. 247, 257 S.W. 538; *Stromberg* v. *French*, 236 N.W. 477 (N. Dak.); *Burnside* v. *Byars*, 363 F. 2d 744 (5th Cir. 1966); *Blackwell* v. *Issaquena County Board of Education*, 363 F. 2d 749 (5th Cir. 1966).

In the case of *Board of Directors of the Independent School District of Waterloo, Iowa* v. *Ronald Green*, Iowa 1967, 147 N.W. 2d 854, the Iowa Supreme Court sustained a rule of the school district barring married students from participation in extracurricular activities (basketball). At page 857 of 147 N.W. 2d, the Iowa Supreme Court said:

> "Furthermore courts of equity will not ordinarily interfere by injunctive process with the actions of sub-

ordinate political or municipal tribunals, including school boards. And, where matters are by law left to the discretion of such bodies, the exercise of that discretion, in good faith, absent fraud, will not be disturbed. (Citing cases including the instant case of Tinker v. Des Moines Independent Community School District, 258 F. Supp. 971, 972).

"School boards are charged by law with the important and at times difficult task of operating our public schools. In so doing they are permitted to formulate rules for their own government and that of all pupils. With this they have the right to require compliance with any duties imposed by law and the rules. Code sections 274.1, 274.7, and 279.8.... (282.4).

"The courts of this state are not concerned with the wisdom of discretionary acts on the part of school boards in adopting rules and regulations governing the operation, management and conduct of our schools.

"Stated otherwise it is not for us to concern ourselves with the matter of expediency of a given board rule. The duty of all courts, regardless of personal views or individual philosophies, is to uphold a school regulation unless it is clearly arbitrary and unreasonable. Any other approach would result in confusion detrimental to the management progress and efficient operation of our public school system. It would in effect serve to place operational policies of our schools in the hands of the courts which would be clearly wrong if not unconstitutional.

"The problem here presented is not whether this court, sitting in the position of defendant board, would or would not have adopted the challenged rule. Rather, our task is to determine whether it is so unreasonable and arbitrary as to be illegal, void and unenforceable. In support of the foregoing see 79 C.J.S., Schools and School Districts, Secs. 493-496, pages 442-445, and 47 Am. Jur., Schools, Sections 45-47, pages 326-329."

At page 860 of 147 N.W. 2d, the Iowa Supreme Court said:

> "We conclude the rule adopted by defendant board barring married students from participating in extra-curricular activites is neither arbitrary, unreasonable, irrational, unauthorized, nor unconstitutional. In taking this position we do not stand alone. See Kissick v. Garland Independent School District, supra; Starkey v. Bd. of Ed. of Davis County Sch. Dist., 14 Utah 2d 227, 381 P. 2d 718; State ex rel. Thompson v. Marion County Board of Education, 202 Tenn. 29, 302 S.W. 2d 57; State ex rel. Baker v. Stevenson, Ohio Com. Pl., 189 N.E. 2d 181; and Cochrane v. Mesick Consol. School Dist. Board of Ed., 360 Mich. 390, 102 N.W. 2d 569."

Byrd v. *Gary,* 184 F. Supp. 388, District Court of South Carolina. In that case plaintiffs brought action seeking reinstatement and an injunction against further expulsion of students sent home for attempting to organize boycott by student body of product served in the school cafeteria. Students were warned that the boycott would not be permitted. In the course of the opinion, the Court said:

> "The defendant school officials with no intent to discriminate, took such action as in their discretion the situation required. Such discretionary action is not subject to attack under the Civil Rights Act,, 42 U.S.C.A., Sec. 1981 et seq."

The question which this Court must determine is not whether or not this Court sitting as the school board would have decided the question in the manner the school board did, but whether or not there has been such an abuse of the discretion vested in the school board as to violate the constitutional rights of the petitioners and to justify interference by this Court.

In deciding that question, and in determining the reasonableness of the regulation against wearing black arm

bands, the Court should consider the background and facts known to the school administration and school board at the time of enacting and confirming the regulation.

The senior Tinkers and the senior Eckhardts who bring this action on behalf of their minor children, are professional protesters and demonstrators motivated in this instance by the Students for Democratic Society, the International League for Peace and Freedom and Reverend Tinker is the Secretary for Peace and Education in some way affiliated with the Friend's Church. They and other outsiders similarly minded saw an opportunity to infiltrate the Des Moines schools with their propaganda.

It is not a question of whether or not these people have the right to demonstrate. It is a question of whether they have the right to demonstrate in the schools.

The superintendent of schools and the principals nipped this plan of infiltration in the bud. No one can accurately judge what might have happened if the school administration had not acted so swiftly. There have been enough other similar demonstrations in schools, particularly in the colleges, that the Court can take judicial notice of the fact that the consequences could have been serious if the demonstration had not been stopped almost before it got started.

Christopher Eckhardt went directly to the principal's office to tell him he was wearing a black arm band in defiance of the school regulation and that he refused to remove it. When the vice principal called his mother, she said he had a constitutional right to wear the arm band.

Notwithstanding this prompt action on the part of the school administration, there was physical violence inflicted on one of the suspended students at Roosevelt, Bruce Clark, and perhaps also on Ross Peterson. (A. 62, A. 71).

John Tinker created a disturbance at North High by wearing the arm band. He was warned to take the arm band off. He said he was not in fear of being attacked because there were too many people there. (A. 18).

Mary Beth Tinker was warned that she would get in trouble wearing the arm band. The boys made smart remarks. (A. 26).

In the brief time the arm bands were worn, there was a disturbance in the schools and certainly the school officials could reasonably calculate and expect the situation to deteriorate and become worse if not stopped at its inception.

Dr. Peterson, in charge of secondary education, said that for the good of the school system they did not think demonstrations should be permitted. He stated, "We allow for free discussion of these things in the classes. The policy was based on a general school policy against anything that was a disturbing situation within the school. The school officials believe that the educational program would be disturbed by students wearing arm bands."

The proponents of the arm bands were permitted to appear before the school board, represented by an attorney, and everyone was given an opportunity to speak that desired to do so. As stated by the president of the school board, "Our board room was filled to overflowing. There were a few signs present, and on several occasions it was a little bit touch-and-go as far as maintaining order, but we did get through. In other words, there was some demonstration from people locally and apparently from outside the city."

The case is distinguishable from the freedom of religion cases such as *West Virginia* v. *Barnette*, 319 U.S. 624, 63 S. Ct. 1178; *School District* v. *Schempp*, 374 U.S. 203,

and *Engel* v. *Vitale*, 370 U.S. 421. The wearing of black arm bands had no religious significance whatever. They were seeking to demonstrate in order to influence others to believe as they did relative to the war in Viet Nam. The record reflects that neither the petitioners nor the parents were strangers to this form of persuasion. They, together with their parents, have demonstrated on a number of other occasions. They were seeking to use the public school as a captive audience as a place to promote their own beliefs. Respondents respectfully submit that the First and Fourteenth Amendments to the Constitution do not require school authorities to permit this kind of activity among the student body when, as in this case, there is a reasonable likelihood it will disrupt the educational process.

As stated in *Board of Directors of Independent School District of Waterloo* v. *Green*, 147 N.W. 2d 854 at 858:

> "Stated otherwise it is not for us to concern ourselves with the matter of expediency of a given board rule. The duty of all courts, regardless of personal views or individual philosophies, is to uphold a school regulation unless it is clearly arbitrary and unreasonable. Any other approach would result in confusion detrimental to the management, progress and efficient operation of our public school system. It would in effect serve to place operational policies of our schools in the hands of the courts which would be clearly wrong if not unconstitutional."

Respondents submit that the school administration and school board in the exercise of their discretion were justified in adopting the rule forbidding the wearing of arm bands, because under the circumstances, a disturbance in school discipline and the orderly processes of education was reasonably to be anticipated if the arm bands were worn.

CONCLUSION

For the reasons stated in the foregoing brief and argument, the judgment of the District Court as affirmed by the Circuit Court of Appeals should be affirmed by this Court as requested by respondents.

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